Supreme Court, U.S.
FILED
APR 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1577

In the Supreme Court of the United States

OCTOBER TERM, 1985

W. D. DINWIDDIE, JOE LEWIS AND TOM KENNAN,
PETITIONERS,

VS.

THE BOARD OF COUNTY COMMISSIONERS OF LEA COUNTY, W. H. BRININSTOOL, ERNEST McNUTT, AND BILLY W. JOHNSON, COMMISSIONERS; STERN BROTHERS AND COMPANY, AND PAT SNIPES, COUNTY CLERK OF LEA COUNTY, NEW MEXICO,
RESPONDENTS.

SUPPLEMENTAL

PETITION FOR A WRIT OF CENTIORARI

TO THE SUPREME COURT OF

THE STATE OF NEW MEXICO

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IN THE DISTRICT COURT
COUNTY OF LEA, STATE OF NEW MEXICO
(Filed January 21, 1985)

No. CV-84-1002

W.D. DINWIDDIE, JOE LEWIS
and TOM KENNAN,

Plaintiffs,

vs.

THE BOARD OF COUNTY COMMISSIONERS
OF LEA COUNTY, W.H. BRININSTOOL,
ERNEST McNUTT, and BILLY W. JOHNSON,
Commissioners; and PAT SNIPES, County Clerk
of Lea County, New Mexico,

Defendants

DECISION AND SUMMARY JUDGMENT

This case coming on for hearing upon Defendants' Motion for Dismissal of Petition, and the Court having considered affidavits attached to the motion and the Honorable Mack Easley presenting oral argument on behalf of the Defendants and the Honorable William Brainerd presenting oral argument on behalf of the Plaintiffs, and the parties having submitted original and supplemental memorandums of authority, and the Court being fully advised in the premises enters the following decision.

Plaintiffs have attacked the validity of the Lea County Special Bond Election for a cultural facility which was held on September 18, 1984. Defendants argue that Plaintiffs' petition must be dismissed because it fails to comply with the

requirements for an election contest under Section 1-14-1, et seq. NMSA 1978. Plaintiffs counter that the election contest provisions have no application whatsoever citing *Wiggins v. Lopez*, 73 NM 224, 387 P.2d 330 (1963). Section 4-49-8, NMSA 1978 specifically provides that the bond election "shall be held and conducted in the same manner as general elections, including recount and contest,". Although there are many cases contesting bond elections, the precise question presented remains one of first impression. Notwithstanding that the election contest law refers only to "unsuccessful candidate" there is no logical reason why the same procedure should not be applied to a bond election. An election contest seeks to change a certified result of the election. The contest procedure is available even if "did not pass" is the certified result. Plaintiffs' petition is not verified as required by Section 1-14-3, NMSA 1978. Plaintiffs do not allege that the challenged votes actually changed the result of the election as required by *Heth v. Armijo*, 83 NM 498 (1972). Plaintiffs' complaint insofar as it seeks to contest the results of the election should be dismissed.

Plaintiffs' complaint also challenges the validity of the entire election because of a complete failure to comply with the statutory requirements concerning precinct consolidation. In the case of *Wiggins v. Lopez*, *supra*, the Supreme Court upheld a challenge to a bond election held in Wagon Mound School District Number 12, Mora County, New Mexico. In that case the Supreme Court of New Mexico invalidated the school board election because the School Board failed to publish the statutory notice, notwithstanding that the election was given wide publicity and there was an excellent voter turnout.

In this case, the Plaintiffs allege that the election should be invalidated because the County Commissioners failed to comply with the requirements for consolidation of precincts. They refer the Court to the following statutes:

1-3-5. Precincts; powers of county commissioners.

No precinct shall be created, divided, abolished or consolidated or the boundaries or polling place therein changed less than four months prior to each election, except by order of the district court.

1-3-8. Precinct changes; notice and publication.

Upon the adoption of any resolution, or upon the final action of any district court upon a petition creating, abolishing, dividing or consolidating any precinct, or changing any precinct boundary or changing any designated polling place, the board of county commissioners shall:

A. send a certified copy of the resolution or court order to the secretary of state and to the county chairman of each of the major political parties; and

B. publish once the resolution in a newspaper as provided in the Election Code (this chapter).

Defendants have not shown that they have complied with these statutes. For purposes of this hearing, the Court must assume that there was no compliance. Nevertheless, Defendants are entitled to Summary Judgment for two reasons. Section 1-3-4 specifically deals with precinct consolidation and notice in certain elections. It reads as follows:

1-3-4. Consolidation of precincts; notice.

A. Precincts may be consolidated by the appropriate governing authority for the following elections:

(1) statewide special elections;

(2) countywide special elections;

(3) elections to fill vacancies in the office of representative in congress;

> (4) municipal candidate and bond elections unless otherwise prohibited; and
>
> (5) school district candidate and bond elections unless otherwise prohibited.
>
> B. When precincts are consolidated as provided in this section, the notice of election, in addition to the other matters required by law, shall state therein which precincts have been consolidated and the designation of the polling place.

As I read this statute, it is self-contained. It simply provides that in certain elections, precincts may be consolidated for the purposes of that election only. It requires that notice of consolidation be given in the notice of election. In Sections 1-3-5 and 1-3-8 the word "consolidated" is limited to a permanent consolidation by its association with the words "created, divided, abolished". Although in this case the governing authority was the Board of County Commissioners, in other elections the governing authority could be a city council or school board.

A general election was held within sixty days of the special bond election. Surely the Legislature did not intend that after the County Commissioners consolidated certain precincts for purposes of the special election, they would then be required to divide the precincts in strict compliance with Sections 1-3-5 and 1-3-8 for purposes of the general election.

The second reason that the Plaintiffs' complaint to invalidate the election must fail is the rationale of the recent case of *Martinez v. Harris*, Supreme Court of New Mexico, November 5, 1984, Number 15,625. In that case the Supreme Court stated:

> We will not read a constitutional provision in such a way that might, in certain circumstances, deny eligible voters their right to vote *in* their precincts only because the ballot box or voting machine *has*

> *been placed outside* their precincts' boundaries. Any earlier cases holding otherwise are expressly overruled and shall not govern when there is no evidence that the integrity of the electoral process has been destroyed or even threatened by the physical location of the polling place.

In Plaintiffs' complaint, there is no allegation whatsoever that the failure to comply with the consolidation procedures, if such compliance is required, destroyed the integrity of the bond election. Indeed, it is difficult to imagine how such compliance or noncompliance would have any effect on this election.

Defendants are granted summary judgment and Plaintiffs' complaint is hereby dismissed with prejudice.

IT IS FURTHER ORDERED that all briefs and supplemental briefs are hereby filed and shall be part of the record proper.

(s) W. J. SCHNEDAR
DISTRICT JUDGE